APF Carting, Inc. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO and Local 958, Laborers International Union of North America, AFL–CIO, Party in Interest

New York Connecticut Waste Recycling, Inc. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO and Local 958, Laborers International Union of North America, AFL–CIO, Party in Interest

APF Carting, Inc. and its alter ego Gem Enterprises, Inc. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO and Local 958, Laborers International Union of North America, AFL–CIO, Party in Interest

Local 116, Production and Maintenance Employees Union *and* Local 813, International Brotherhood of Teamsters, AFL–CIO. Cases 2–CA–27220, 2–CA–27303, 2–CA–27476, 2–CA–27488, 2–CA–27507, 2–CA–27634, 2–CA–28135, 2–CA–28409, 2–CA–28897, and 2–CB–15927

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On April 2, 1999, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondents filed exceptions, a supporting brief, and an answering brief. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified.[2]

As detailed in the judge's decision, prior to May 19, 1994, Respondent APF Carting, Inc. (APF) was engaged in the business of sorting and carting waste material from its recycling transfer station in Mount Kisco, New York. APF was owned and operated by Alan, Peter, and Emelia Ferraro[3] and General Manager Gary Mueller. APF's machine operators, tractor-trailer drivers, and mechanics were represented by Local 813, International Brotherhood of Teamsters, AFL–CIO (Local 813).

On December 2, 1993, APF signed a Conditional Sales Agreement with Respondent New York Connecticut Waste Recycling, Inc. (NYConn). NYConn operated a transfer station in Danbury, Connecticut, and had a collective-bargaining agreement with Local 958, Laborers International Union of North America (Local 958) covering certain of its employees at the Danbury station. The sale to NYConn was conditioned on certain permits granted by the New York State Department of Environmental Conservation.

The following day, on December 3, 1993, Respondent Gem Enterprises, Inc. (Gem) was incorporated. Emelia Ferraro and Gary Mueller were the owners and operators of Gem. Thereafter, on May 1, 1994, in anticipation of the sale, Gem contracted with NYConn for the carting of waste material from the Mount Kisco facility, which previously had been performed by APF drivers. On May 11, Gem signed a collective-bargaining agreement with Local 958. On May 19, APF was sold to NYConn, and the equipment formerly owned by APF was transferred to Gem.

The judge found, and we agree, that Respondents APF and Gem are alter egos.[4] The judge further found that Respondents APF and Gem engaged in extensive violations of Section 8(a)(1), (2), (3), and (5). These violations included bypassing Local 813 in January 1994 and directing APF employees to seek other employment if they wanted to continue membership in Local 813;[5]

[1] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[3] Allan, Peter, and Emelia Ferraro are siblings. As reflected in the record, all three were shareholders of APF Carting. Alan and Peter were president and vice president, respectively, of APF.

[4] In excepting to this finding, the Respondents argue, inter alia, that there is no evidence that Gem was created for an illegal purpose, i.e., to evade APF's responsibilities under the Act. The judge did not address whether Gem was created for such an illegal purpose and we also find it unnecessary to do so. Although motive is a relevant consideration, the Board does not require that an illegal motive be established to find alter ego status. See *Dupont Dow Elastomers L.L.C.,* 332 NLRB 1071 fn. 1 (2000), and cases cited there. See also *Goodman Piping Products v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984). In agreement with the judge, we find that alter ego status has been established based on the relevant objective criteria, including substantially identical management, business purpose, operation, equipment, and ownership.

The judge also found that APF and Gem constituted a single employer. We do not adopt this finding. See *NYP Acquisition Corp.,* 332 NLRB 1041 fn. 1 (2000), affd. sub nom. *Newspaper Guild of New York Local 3,* 261 F.3d 291 (2d Cir. 2001) (single-employer analysis is applicable only where two ongoing businesses are coordinated by a common master).

[5] The General Counsel excepts to the judge's dismissal of the allegation that Respondent APF also violated Sec. 8(a)(5) by refusing to engage in effects bargaining with Local 813 over the sale. The judge

withdrawing recognition from and refusing to bargain with Local 813 since May 1994;[6] refusing to furnish requested information to Local 813 in June 1994 concerning the relationship between APF and Gem; requesting employee Russell Bonds in May 1994 to withdraw membership from Local 813, instructing him to sign an authorization card for Local 958, and threatening him with discharge; distributing a Local 958 authorization card to employee William Hiltbrand in May 1994 and telling him and other employees that they "had to sign Local 958 cards";[7] and threatening to terminate employee Jeffrey McBride in May 1994 if he did not sign a Local 958 card, initially refusing to hire him when he failed to do so,[8] and subsequently discharging him in January 1995 because of his protected union activities. We also adopt these findings.[9]

Although finding that Gem violated Section 8(a)(3) by initially refusing to hire McBride in May 1994, the judge dismissed the allegation that Gem unlawfully refused to offer employment to other former APF employees who likewise declined to withdraw membership in Local 813. The judge so found because the General Counsel had failed to show that the other alleged discriminatees had applied for employment with Gem. The General Counsel excepts. For the reasons discussed below, we find merit to those exceptions with respect to Gem's failure to employ driver Robert Colarusso.

As of the date of the conditional sales agreement between APF and NYConn, APF employed five drivers—Russell Bonds, Robert Colarusso, Donald Champlain, Jeffrey McBride, and Kevin Ryan.[10] On May 19, 1994, the day of the actual sale, Bonds, Colarusso, and McBride were APF's only remaining drivers. Champlain had left APF on March 8, 1994, to work at Suburban Carting as a route driver. Ryan also left APF and began working at Trottown Transfer Company on May 16, 1994. In view of this evidence that Champlain and Ryan had left APF's employment prior to the date that Gem began its operations, and absent any allegation that these employees were unlawfully terminated, we find that Gem was not obligated to offer these former APF employees driving positions. Of the remaining three drivers, the evidence shows that both Bonds and McBride were offered driver's jobs with Gem on the condition that they resign from the Union. Bonds complied and was hired, whereas McBride refused and was unlawfully denied employment.

The sole remaining APF driver was Colarusso.[11] We find that, in dismissing the allegation that the Respondents unlawfully failed to offer Colarusso employment, the judge erred in relying on Colarusso's failure to formally apply for a driver's job with Gem. As indicated above, Gem was APF's alter ego and there was no hiatus in operations between APF and Gem. Moreover, the record is replete with evidence that the Respondents, through Mueller, made clear to the APF drivers that they had to withdraw from Local 813 and sign up with Local

found that APF offered to engage in effects bargaining but Local 813 was unwilling to do so. We adopt these findings.

[6] The judge declined to find that Gem violated Sec. 8(a)(2) by recognizing Teamsters Local 958 because the complaint was not amended to allege this violation. The General Counsel excepts, contending that the matter was fully litigated. We find it unnecessary to decide the matter in view of our finding that Gem, as an alter ego of APF, unlawfully withdrew recognition of Local 813. Our remedy requiring Gem to bargain with Local 813 will effectively preclude Gem from continuing to recognize Local 958.

[7] The judge dismissed the allegation that Respondent Gem subsequently discharged Hiltbrand because of his protected union activity in violation of Sec. 8(a)(3). The judge found that the General Counsel failed to make an initial showing under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), that the discipline was motivated by Hiltbrand's protected activity, and that in any event Gem had established that Hiltbrand would have been discharged even in the absence of protected conduct for abusing equipment. In affirming the dismissal of this allegation, Member Liebman relies solely on the judge's finding that Hiltbrand would have been discharged even absent his protected activity.

[8] Although the judge found in sec. II,A,12 of his decision that Respondent Gem refused to hire McBride, he failed to formally include this violation in his conclusions of law. We have therefore amended the conclusions of law to conform to the judge's findings.

[9] The General Counsel excepts to the judge's failure to find various additional violations of Sec. 8(a)(1) and (2) of the Act by Respondents APF and Gem in accordance with the evidence adduced at the hearing. We find it unnecessary to pass on the General Counsel's exception as the additional violations would be cumulative and would not affect the Order, remedy, or notice.

The General Counsel also excepts to the judge's dismissal of the 8(a)(1), (2), (3), and (5) allegations against NYConn. The judge found that NYConn was not the legal successor to APF because NYConn subcontracted the hauling work to Gem prior to the sale, never performed the trucking function at Mount Kisco, and therefore had no reason to hire the former APF truckdrivers. The judge found that although NYConn did hire APF's two remaining machine operators and mechanics as of the date of sale, they did not constitute a majority of the four employees who were hired by NYConn in those employee classifications. Finally, the judge also found that NYConn's president, James Gallante, did not distribute or urge employees to sign Local 958 authorization cards. We adopt the judge's findings.

[10] APF also employed Robert Brichta and Jeffrey Woodward as machine operators and Robert Mead as a mechanic. Since Gem only hired tractor-trailer drivers and not machine operators or mechanics, there is no basis to find the additional 8(a)(3) violations alleged in the complaint regarding these employees. In any event, the evidence shows that Woodward had left APF's employment in April 1994 and that Brichta and Mead were hired by NYConn. See fn. 9, supra.

[11] Although Colarusso had arranged to accept a job with another employer prior to his discharge by the Respondents, he remained as an active APF employee as of May 19, 1994.

958 to continue their employment.[12] In these circumstances, we find that by unlawfully conditioning continued employment on rejection of the employees' bargaining representative, the Respondents constructively discharged Colarusso. See *Campbell-Harris Electric,* 263 NLRB 1143 fn. 6 and 1149 (1982), enfd. 719 F.2d 292 (8th Cir. 1983); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Accordingly, we find that the failure to employ Colarusso violated Section 8(a)(3) of the Act.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 8 of the judge's conclusion of law.

"8. By refusing to employ McBride and Colarusso and by subsequently discharging McBride for his union activities, Respondents APF and Gem have engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, APF Carting and its alter ego Gem Enterprises, Inc., Mt. Kisco, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Within 14 days from the date of this Order, offer Jeffrey McBride and Robert Colarusso immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(d) Make Jeffrey McBride and Robert Colarusso whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the following for relettered paragraph 2(f).

"(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT state to employees that their employment is conditioned on their withdrawal of membership in Local 813, International Brotherhood of Teamsters, AFL–CIO or on their joining Local 958, Laborers International Union of North America, AFL–CIO.

WE WILL NOT threaten employees with discharge if they support Local 813 of if they refuse to withdraw membership in Local 813.

WE WILL NOT threaten employees with discharge if they refuse to join Local 958.

WE WILL NOT distribute Local 958 authorization cards to employees and urge them to sign the cards.

WE WILL NOT refuse to hire employees and discharge them for activities protected by Section 7 of the Act.

WE WILL NOT refuse to recognize and bargain with Local 813 as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, working conditions, or other terms and conditions of employment of the employees and refuse to honor the collective-bargaining agreement applicable to those employees.

WE WILL NOT bypass Local 813 and deal directly with our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[12] Although there is no clear evidence that Mueller stated this to Colarusso directly, it is reasonable to infer under the circumstances that Colarusso would have heard about this unlawful condition from McBride and/or Hiltbrand. In any event, it is clear that filing an application with Gem would have been futile if Colarusso failed to accede to the unlawful condition.

WE WILL, on request, bargain with Local 813 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All chauffeurs and helpers, bulldozer operators, machine drivers/operators and recycling truck drivers at all locations of Respondents, excluding guards and supervisors as defined in the Act.

WE WILL comply with the terms and conditions of the collective-bargaining agreement between Respondent APF and Local 813, including making the appropriate payments, and make whole employees for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, offer Jeffrey McBride and Robert Colarusso immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enoyed.

WE WILL make Jeffrey McBride and Robert Colarusso whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Jeffrey McBride and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

APF CARTING, INC. AND GEM ENTERPRISES, INC.

Nancy K. Reibstein, Esq. and *Katherine R. Schwartz, Esq.,* for the General Counsel.

Steven B. Horowitz, Esq. (Ruderman & Glickman, P.C.), of Springfield, New Jersey, for Respondent (APF).

Ira Drogin, Esq., of New York, New York, for Respondent (Gem).

Edward F. Beane, Esq. (Keane & Beane), of White Plains, New York, for Respondent (NYConn).

Sonja P. Fritts, Esq. (Cohen, Weiss & Simon), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York, New York, during 15 days of hearing beginning November 8, 1995, and concluding on July 2, 1998. On numerous charges, which were filed, an amended consolidated complaint was issued on June 8, 1995. The consolidated complaint alleged that Respondents violated various sections of the National Labor Relations (the Act), as amended. Respondents filed answers denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on December 4, 1998.

On the entire record of the case including my observation of the demeanor of the witnesses I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, APF Carting, Inc. (APF), a New York corporation, with an office and place of business in Mount Kisco, New York, has operated a recycling transfer station in Mount Kisco and has been engaged in the sorting and carting of waste material. Respondent, New York Connecticut Waste Recycling, Inc. (NYConn), a corporation, with an office and place of business in Danbury, Connecticut, has operated a recycling transfer station in Danbury, Connecticut, and Mount Kisco and has been engaged in the sorting of waste material. Respondent, Gem Enterprises, Inc. (Gem), a New York corporation, with an office and place of business in Bedford Hills, New York, has been engaged in the carting of waste material and brokerage of dumping. Respondents have admitted and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find that Local 813, International Brotherhood of Teamsters, AFL–CIO (Local 813 or the Union), Local 958, Laborers International Union of North America, AFL–CIO (Local 958), and Local 116, Production and Maintenance Employees Union (Local 116) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. The background

Until May 19, 1994,[1] when APF sold its business to NYConn, APF operated a recycling transfer station in Mount Kisco, New York. From this Mount Kisco transfer station, which APF occupied by virtue of a lease agreement with the village of Mount Kisco, APF engaged in the business of sorting and carting waste material. Alan Ferraro and his brother Peter were president and vice president respectively of APF. Gary Mueller was APF's general manager.

APF and Local 813 had a collective-bargaining relationship since the 1980s. The parties' last collective-bargaining agreement was effective by its terms from November 1, 1990, through November 30, 1993. The contract covered the bargaining unit consisting of chauffeurs and helpers, bulldozer operators, machine drivers/operators, and recycling truckdrivers. As of December 1993 APF employed the following bargaining unit employees, two machine operators (Robert Brichta and Jeffrey Woodward), five tractor-trailer drivers (Russell Bonds, Jeffrey McBride, Robert Colarusso, Donald Champlin, and

[1] All dates refer to 1994 unless otherwise specified.

Kevin Ryan), and one mechanic (Robert Mead). As of May 19, when the sale of APF took place APF employed the following bargaining unit employees: One mechanic (Robert Mead), one machine operator (Robert Brichta) and two truckdrivers (Jeffrey McBride and Russell Bonds).

NYConn operated a transfer station in Danbury, Connecticut, where it was engaged in the sorting and carting of waste material. James Galante is president and owner of NYConn and Thomas Milo is secretary and owner of the corporation. On December 2, 1993, APF and NYConn signed a Conditional Sales Agreement. By letter dated December 10, 1993, Allan Ferraro wrote to Michael Lieber, counsel to Local 813, that "APF Carting has entered into a conditional sales contract with NYConn, Recycling which would in effect transfer all of the company's business to them." The letter further stated, "[W]e offer to meet with you at your convenience to discuss the affect [sic] of that contract upon our unit employees."

In early January 1994, Local 813 Business Agent Marcello Mastropietro visited the Mount Kisco station and told several employees that APF was selling its business to NYConn. Mastropietro distributed NYConn job applications for the employees to complete and for the Union to submit to NYConn. Later that day, Mueller called a meeting with the APF drivers. Russell Bonds, one of the drivers present, testified that he asked Mueller about Local 813 and that Mueller replied that "NYConn had their own Local, which was 958."

Gem was incorporated on December 3, 1993, the day after APF and NYConn entered into the Conditional Sales Agreement. Emelia Ferraro, the sister of Allan and Peter, is the president of Gem and Mueller is the vice president. Emelia and Mueller are the sole shareholders of Gem. On May 1, NYConn and Gem entered into a subcontracting agreement for Gem to perform the trucking portion of the former APF business. On May 11, Gem signed a collective-bargaining agreement with Local 958. On May 19, the equipment formerly owned by APF and sold to NYConn was transferred to Gem.

2. Alter ego and single employer

The complaint alleges that Gem is the Alter Ego of APF and that APF and Gem constitute a single employer. In *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), the Board stated the following criteria for establishing alter ego status:

> Clearly each case must turn on its own facts, but generally we have found alter ego status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

Not all of these indicia need be present. *Blake Construction Co*., 245 NLRB 630, 634 (1979), enf. granted in part and denied in part on other grounds 663 F.2d 272 (D.C. Cir. 1981); *E. G. Sprinkler Corp*., 268 NLRB 1241, 1243 (1984), enfd. sub nom. *Goodman Piping Products v. NLRB,* 741 F.2d 10 (2d Cir. 1984); *Walton Mirror Works,* 313 NLRB 1279, 1283–1284 (1994). The Board has held that common ownership is established if both companies are owned by members of the same family. *J. M. Tanaka Construction*, 249 NLRB 238, 241 fn. 29 (1980), enfd. 675 F.2d. 1029 (9th Cir. 1982); *Superior Export Packing Co*., 284 NLRB 1169, 1170 (1987); *Walton Mirror Works,* supra, 313 NLRB at 2184.

I find that all of the legal criteria have been satisfied. Mueller was general manager of APF and is vice president of Gem. I credit Bonds' testimony, who appeared to me to be a credible witness, that Emelia Ferraro regularly assigned work at APF. Emelia is president of Gem. The operation and business purpose of the Companies were the same. Indeed, at the meeting at the board of trustees of the Village of Mount Kisco held on March 21, 1994, it was stated that "the old APF operation would be moving back to Mount Kisco." Mueller conceded that with respect to the Hartford Burn Plant, Gem was working on a APF letter of credit until August 1994. With respect to equipment, Gem used the same equipment that APF used. The record contains the bills of sale from NYConn to Gem of the Peterbilt Tractors, which were executed contemporaneously with the sale of the equipment by APF to NYConn. With respect to ownership, APF was owned by Allan and Peter Ferraro. The record contains two agreements, which refer to the principals of APF as Allan, Peter, and Emelia Ferraro. Emelia was a major shareholder of Gem. As stated above, the Board has held that common ownership is established if both companies are owned by members of the same family. See *Walton Mirror Works,* supra. Accordingly, I find that Gem is the alter ego of APF.

The complaint also alleges that APF and Gem constitute a single employer within the meaning of the Act. The criteria that the Board normally looks to in deciding whether nominally separate businesses may be regarded as a single employer are common management, common ownership, centralized control of labor relations, and interrelation of operations. See *Merchants Iron & Steel Corp*., 321 NLRB 360 fn. 1 (1996). For the same reasons stated above for finding that Gem is the alter ego of APF, I find that the two corporations constitute a single employer.

3. Request for effects bargaining

The complaint alleges that since December 1993, the Union requested that APF engage in effects bargaining and that APF refused to do so in violation of Section 8(a)(1) and (5) of the Act. By letter dated December 10, 1993, Allan Ferraro, president of APF, wrote to Michael Lieber, general counsel of Local 813, as follows:

> APF Carting Inc. has entered into a conditional sales contract with NYConn Recycling which would in effect transfer all of the company's business to them. We believe that the conditions of that contract will be met in the future and the sale will become effective. Because of that belief, we offer to meet with you at your convenience to discuss the affect [sic] of that contract upon our unit employees.

On February 4, Lieber wrote to Sanford Pollack, counsel to APF, requesting that the parties meet to negotiate a renewal collective-bargaining agreement. Lieber pointed out that he had not as yet been provided a copy of the Conditional Sales Agreement. Lieber testified that he received the copy of the Conditional Sales Agreement on February 10. Lieber further testified that Pollack had "from the beginning wanted to pro-

ceed with effect bargaining as opposed to bargaining for a renewal collective-bargaining agreement." Lieber stated that the Union instead "wanted to negotiate a successor collective-bargaining agreement with APF." Lieber testified, "I wasn't looking to have an effects bargain, because I didn't think it was the type of situation that required an effects bargain. I was looking to bargain over a successorship and not effects bargain."[2] By letter dated June 13, 1994, Pollack informed Lieber that APF "[R]emains willing to discuss the effects of our discontinuance of operations."

As pointed out above, the complaint alleges that since December 1993, APF refused to engage in effects bargaining regarding its decision to sell its business to NYConn. The record clearly indicates, however, that APF offered to engage in effects bargaining. Lieber testified however, that the Union was unwilling to engage in effects bargaining and only wanted to bargain over a successor agreement. Accordingly, I find that the General Counsel has not shown that APF refused to engage in effects bargaining and, therefore, the allegation is dismissed.

4. Bypassing the Union

The complaint alleges that in January 1994 Mueller bypassed the Union and dealt directly with APF's employees by directing and encouraging them to seek other employment if they wanted to continue membership in the Union, in violation of Section 8(a)(1) and (5) of the Act.

In early January 1994, Mastropietro visited the Mount Kisco transfer station and told several employees that APF was selling its business to NYConn. Mastropietro distributed NYConn job applications for the employees to complete and for the Union to submit to NYConn. Realizing that the employees had heard about the APF sale, Mueller convened a meeting later that day with APF drivers in the APF garage. Donald Champlin, one of the APF drivers, who appeared to me to be a credible witness, testified that Mueller told the drivers that "we all better go out and find another job because NYConn was taking over and you know that NYConn had her own Union, which was 958." Champlin further testified that Mueller told them "[I]f we had any NYConn applications, please give them to him, and he would see that they got to NYConn. Because if you gave them to the Union, you know, nothing would probably happen with them."

I credit Champlin's testimony and find that by dealing directly with the drivers Respondent unlawfully bypassed the Union and failed in its duty to bargain exclusively with the Union, in violation of Section 8(a)(1) and (5) of the Act. See *E. I. du Pont & Co*., 311 NLRB 893, 919 (1993); *Leisure Knoll Assn.,* 327 NLRB 327 (1999).

5. Successorship

The General Counsel contends that NYConn is the legal successor to APF. Accordingly, the complaint alleges that NYConn refused to recognize Local 813 as the exclusive collective-bargaining representative of the NYConn unit and has failed to offer employment to the former APF unit employees.

On December 2, 1993, NYConn entered into a Conditional Sales Agreement to purchase the assets of APF at the Mount Kisco transfer station. This asset sale was conditioned on the Village of Mount Kisco's approval of the assignment and the issuance to NYConn of a permit to operate the transfer station by the New York State Department of Environmental Conservation (DEC). These conditions were not satisfied until May 1994. Prior to the sale, which was consummated May 19, NYConn decided that the transportation of solid waste would be subcontracted to Gem. NYConn never performed the trucking function in Mount Kisco and therefore did not hire any tractor-trailer drivers. It is well settled that a "purchasing employer is not obligated to hire the selling company's work force and that only the refusal to hire for a discriminatory motive is unlawful." *Shortway Surburban Lines,* 286 NLRB 323 (1987), enfd. 862 F.2d 309 (3d Cir. 1988). In analyzing whether an employer's hiring practices were discriminatorily motivated, the Board applies the traditional *Wright Line* analysis. *New Breed Leasing Corp.,* 317 NLRB 1011, 1022 (1995). The complaint alleges that since February 1994, NYConn refused to offer employment to APF's tractor-trailer drivers. The necessary approvals for the sale of the assets of APF to NYConn did not take place until May 1994. Until then NYConn was not obligated to, nor could it have offered employment to the former APF employees. By the time the sale was consummated NYConn had decided to subcontract the hauling work to Gem. Accordingly, it had no reason to hire APF's former tractor-trailer drivers. I believe that the General Counsel has not made a prima facie showing sufficient to support the inference that NYConn's refusal to hire the former APF tractor-trailer drivers was because of their membership in Local 813. Accordingly, the allegation is dismissed. See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

As stated in *Harbert International Services,* 299 NLRB 472, 475 (1990):

> It is settled law under the Board's and Court's traditional test that when a new employer takes over the business of a formerly unionized operation and does so with a substantial and representative complement of bargaining unit employees, a majority of whom had been similarly employed by the predecessor, the new employer will be considered a "successor employer" and will inherit certain of the predecessor's bargaining obligations.

See *NLRB v. Burns Security Services,* 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 275 (1987).

NYConn's payroll records establish that as of the payroll period ending May 25, NYConn employed one mechanic, Robert Mead, and three machine operators, Robert Brichta, William Magrino, and Scott Edwards. Two of the four bargaining unit employees, Mead and Brichta, were former APF employees. The other two were not. Inasmuch as NYConn did not hire a majority of former APF employees I find that NYConn is not the legal successor to APF. Accordingly, the allegation that

[2] The General Counsel has moved to correct LL. 11–12, p. 206 (February 2, 1998) of the transcript. The General Counsel's motion is granted. The transcript shall read "APF was prepared to meet to effects bargain."

NYConn unlawfully refused to recognize and bargain with Local 813 is dismissed.[3]

6. Alleged violations by Mueller in May 1994

In May 1994, Mueller had a conversation with Bonds. Mueller told Bonds that he and Emelia Ferraro were forming a company called Gem Enterprises and Mueller offered Bonds a job at Gem. I credit Bonds testimony that Mueller told him that he would, "[H]ave to get a withdrawal card from 813 and join Local 958." I also credit Bonds testimony that Mueller told him, "I could not cause any problems with any of the guys that he was going to get, as far as other employees, as far as trying to get them into 813, or he will fire me and I will have nothing." Bonds met again with Mueller on the day that the sale was consummated. Mueller told Bonds that he and Emelia Ferraro were now in business as Gem Enterprises and that Bonds could start working for them the following Monday. I credit Bond's testimony that Mueller told him he would have to get a withdrawal card from Local 813 to continue working for Gem. Bonds met again with Mueller approximately 1 week later. I credit Bonds testimony that at that time Mueller told him that "I'd have to sign a 958 card for Local 958." Bonds signed the authorization card for Local 958 but omitted the date pursuant to Mueller's instruction.

By requesting that Bonds withdraw membership from Local 813 and join Local 958 and by threatening him with discharge, I find that Respondent, through Mueller, violated Section 8(a)(1) of the Act. In addition, by Mueller instructing Bonds to sign an authorization card for Local 958 and by him advising Bonds the manner in which to sign the card Respondent violated Section 8(a)(2) of the Act. See *Citywide Service Corp*., 317 NLRB 861, 876–877 (1995).

7. NYConn's alleged distribution of authorization cards

The complaint alleges that on May 18, 1994, James Gallante, president of NYConn, distributed Local 958 authorization cards to the employees at the Mount Kisco transfer station and urged them to sign the cards. Mead testified that on May 18, Fiorello introduced him to a representative from Local 958 and they asked himself and Brichta to sign authorization cards. Brichta testified that no NYConn representative introduced him to a Local 958 representative but instead that the Local 958 representative introduced himself and told Brichta that "he has cards for us to sign." I credit Brichta's testimony and find that the General Counsel has not shown by a preponderance of the evidence that any NYConn representative distributed Local 958 authorization cards to employees on May 18, and urged them to sign the cards. Accordingly, the allegation is dismissed.

8. Request for information

The complaint alleges that since June 22, the Union has requested that APF furnish it with information concerning the ownership status of APF's equipment but that APF has refused to furnish the information. By letter dated June 22, Lieber requested that APF supply the Union with documentation as to the status of the APF equipment. Specifically, Lieber asked for documentation concerning what arrangements were made for the tractor-trailers and bulldozers. Lieber testified that he needed the information because he believed that Gem was an alter ego of APF and "wanted to find out what happened to the trucks." The parties met for a negotiating session on July 11. Lieber again requested the documentation. He credibly testified, "I advised Mr. Pollack that I needed the information that I had requested in order for me to determine . . . whether or not Gem was a separate, new company or whether it was an alter ego." Pollack refused to turn over the information and told Lieber, "[D]o what you have to do, let the NLRB make the ruling." I find that APF's refusal to furnish the Union with the requested information constitutes a violation of Section 8(a)(1) and (5) of the Act. See *Brisco Sheet Metal*, 307 NLRB 361 (1992).

9. Gem's withdrawal of recognition

The complaint alleges that since May 1994, Gem has withdrawn recognition from Local 813 and has refused to recognize and bargain with Local 813 as the exclusive bargaining representative of the Gem unit, in violation of Section 8(a)(1) and (5) of the Act. On May 11, Gem entered into a collective-bargaining agreement with Local 958. It is undisputed that Local 813 was the exclusive bargaining representative of an appropriate unit of APF's employees. On May 24, Lieber wrote to Mueller demanding that Gem recognize and bargain with Local 813. By letter dated May 31, Sanford Pollack, Counsel to Gem, wrote to Lieber, "[W]e do not agree with your conclusion with regard to the successorship issue." Inasmuch as I have found that Gem is the alter ego of APF, I find that Gem's withdrawal of recognition from Local 813 constitutes a violation of Section 8(a)(1) and (5) of the Act.[4] See *Citywide Service Corp*., supra.

10. McBride discharge

Jeffrey McBride was employed by APF from March 1991 until APF was sold to NYConn on May 19. McBride began working for Gem as a part-time employee in August 1994, and in late August or early September 1994 he was hired by Mueller as a full-time tractor-trailer driver. McBride testified that in early January 1995, all the Gem employees signed Local 813 authorization cards. The evening after the employees signed the Local 813 authorization cards Mueller telephoned McBride at his home. Mueller told McBride, "[W]e have to talk, we have to meet. You guys signed cards." They met the following day. I credit McBride's testimony that Mueller told him, "[Y]ou signed these guys up 813 . . . I can't believe you just f-everybody's job." At the same conversation Mueller also told McBride that he, "[S]tabbed him in the back," and they concluded the conversation by Mueller telling McBride, "[Y]ou have to work on Monday and we'll take it from there." As they

[3] The complaint alleges that NYConn's recognition of Local 116 was unlawful since it was required to bargain with Local 813. In view of my finding that NYConn was not required to bargain with Local 813, the allegation is dismissed.

[4] The General Counsel has requested that I find, sua sponte, that Gem violated Sec. 8(a)(2) by recognizing Local 958. I decline to do so inasmuch as the complaint was not amended to allege this violation and Respondent was given no opportunity to contest the allegation. See *Medin Realty Corp*., 307 NLRB 497, 503 (1992); *Citywide Service Corp.,* supra, 317 NLRB at 879.

left the restaurant where they had been meeting Mueller told McBride, "[H]e's gonna park the trucks and in a year after this all blows down he'll hire more guys and he'll get them in 958, that there's no way he's gonna go with 813." On the following Monday, January 9, 1995, after McBride delivered his first load on the way back to the transfer station the clutch in his truck broke. When McBride returned to the transfer station Mueller told him, "[N]ow that the truck is broken, that he's not going to fix the truck and now I'm laid off." Mueller was unhappy with McBride having signed the authorization card for Local 813. Very soon thereafter, McBride was laid off. I find that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Gem's decision to lay off McBride. See *Wright Line,* supra, 251 NLRB at 1089.

Mueller stated that the reason for laying off McBride was that Gem had no spare truck at the time and he did not know how long it would take to repair the truck. I credit McBride's testimony that it was Mueller's practice that if a driver's truck was being repaired Mueller would have the driver work a night shift hauling refuse to Hartford, Connecticut, where the landfill was open until 3 a.m. Mueller testified that when a truck was out of commission for several days an employee would take vacation or sick days. Mueller admitted that he did not recall McBride to work, even though after McBrides alleged layoff, Mueller hired a new driver. In addition, Mueller admitted that after the truck was repaired he did not recall McBride to work for Gem. I find that Gem has not satisfied its burden of demonstating that the "same action would have taken place even in the absence of the protected conduct." Accordingly, I find that on January 9, 1995, Gem discharged McBride in violation of Section 8(a)(1) and (3) of the Act.

11. Hiltbrand discharge

William Hiltbrand was employed by Gem as a tractor-trailer driver on May 9, 1994. I credit Hiltbrand's testimony that on May 19, 1994, the day of the APF sale, Mueller gave him a Local 958 authorization card to sign and told Hiltbrand and the other employees that they "had to sign 958 cards." I also credit Hiltbrand's testimony that at the same time Mueller asked McBride if he was going to sign the Local 958 card, at which time McBride said that he would not. At that point Mueller told McBride, "[W]ell, I guess you're terminated." I find that Mueller's having distributed authorization cards on behalf of a union constitutes a violation of Section 8(a)(2) of the Act. See *Citywide Service Corp*., supra, 317 NLRB at 877. In addition, Mueller's threat to McBride that he would be terminated if he did not sign an authorization card for Local 958 constitutes a violation of Section 8(a)(1) of the Act.

Mueller discharged Hiltbrand on March 9, 1995. Hiltbrand testified that the only reason Mueller gave for terminating him was for "equipment abuse." I credit Mueller's testimony that Hiltbrand had previously stranded a driver and was warned about his conduct, had run out of fuel by failing to check the gas gauge and had once had a blown air line and failed to follow the proper procedures and had not reported the problem to Mueller. In late April or early March 1995, Hiltbrand was sent to haul a load of refuse to the Westfield, Massachusetts landfilll. When he arrived he could not offload the trailer and he noticed smoke coming from beneath the tractor. Mueller believed that Hiltbrand had negligently allowed an expensive hydraulic pump to be burned. Mueller told Hiltbrand that if Mueller learned that Hiltbrand negligently destroyed the pump, Hiltbrand would be fired. Mueller showed the pump to Mead. I credit Mueller's testimony that Mead told him "this guy drove with his pump engaged." I am making no finding whether in fact Hiltbrand drove with the clutch engaged. I do, however, credit Mueller's testimony that he believed that Hiltbrand abused the equipment and he discharged him for that reason.

I do not believe that the General Counsel had made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Gem's decision to discharge Hiltbrand. Hiltbrand signed the Local 813 authorization card approximately 2 months prior to his discharge. He signed it together with other employees who were not discharged. Had Mueller wanted to terminate Hiltbrand because of his activity on behalf of Local 813, he would have done so much sooner, similar to the timing that was used in discharging McBride. Even, however, if it were deemed that the General Counsel has made a prima facie showing, I believe that because of the equipment abuse, Respondent Gem has satisfied its burden of showing that "the same action would have taken place even in the absence of the protected conduct." *Wright Line,* supra, 251 NLRB at 1089.

12. Gem's alleged failure to offer employment to former APF employees

The complaint alleges that since May 1994, Gem failed to offer employment to former APF unit employees, including McBride, Woodward, Colarusso, and Brichta. I credit McBride's testimony that in May 1994 Mueller told him that he obtained the exclusive contract to haul out of APF's yard and that "I would have to take a withdrawal from 813 if I wanted to come to work for him." McBride did not accept the offer. I find that Gem's refusal to hire McBride unless he withdrew from Local 813 constitutes a violation of Section 8(a)(1) and (3) of the Act. See *C. J. Rogers Transfer,* 300 NLRB 1095, 1100–1101 (1990), enfd. 936 F.2d 279 (6th Cir. 1991). With respect to Woodward, Colaruso, and Brichta, no adequate showing has been made that they applied for employment with Gem. Accordingly, the allegations with respect to them are dismissed.

CONCLUSIONS OF LAW

1. Respondents APF Carting, Inc., and Gem Enterprises, Inc., constitute a single employer and Gem is the alter ego of APF.

2. Respondents APF, Gem, and New York Connecticut Waste Recycling, Inc. are employers engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.

3. Local 813, IBT, Local 958 Laborers International Union of North America and Local 116, Production and Maintenance Employees Union are labor organizations within the meaning of Section 2(5) of the Act.

4. The following employees of Respondents APF and Gem constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All chauffeurs and helpers, bulldozer operators, machine drivers/operators and recycling truck drivers at all locations of the Respondents, excluding guards and supervisors as defined in the Act.

5. At all material times Local 813 has been the exclusive collective-bargaining representative of the employees in the appropriate unit, within the meaning of the Act.

6. By stating to employees that their employment was conditioned on their withdrawal of membership in Local 813 and by joining Local 958; by threatening employees with discharge if they supported Local 813, if they refused to withdraw membership in Local 813 and if they refused to join Local 958, Respondents APF and Gem have engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. By distributing Local 958 authorization cards to employees and by urging them to sign the cards, Respondents APF and Gem have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

8. By discharging McBride for his union activities, Respondents APF and Gem have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

9. By bypassing the Union and dealing directly with the unit employees, by failing to furnish Local 813 with relevant requested information and by withdrawing recognition from Local 813, Respondents APF and Gem have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

10. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

11. Respondents did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent APF, and its alter ego, Respondent Gem, violated Section 8(a)(1) and (5) of the Act, I shall order them to recognize and, on request, bargain with Local 813 as the exclusive bargaining representative of the employees in the appropriate unit. In addition, I shall order Respondents APF and Gem to make whole any employees who may have incurred losses as a result of Respondents' unlawful failure to adhere to the terms of the collective-bargaining agreement. Any backpay owed shall be computed in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Respondents APF and Gem shall also make whole employees by making any unpaid fringe benefit fund contributions as provided by the collective-bargaining agreement and by reimbursing employees for any expenses ensuing from Respondents' failure to make such contributions as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Reimbursement payments to employees shall include interest to be computed in the manner prescribed in *New Horizons for the Retarded,* supra.

Respondents APF and Gem, having initially unlawfully failed to hire McBride, and then, after hiring him, having unlawfully discharged him, I find it necessary to order Respondents to offer him full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered from the time he was initially denied employment to the date of Respondents' offer of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* supra.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[5]

ORDER

The Respondents, APF Carting, Inc. and its alter ego, Gem Enterprises, Inc., Mount Kisco and Bedford Hills, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Stating to employees that their employment is conditioned on their withdrawal of membership in Local 813 or on their joining Local 958; threatening employees with discharge if they support Local 813 or if they refuse to withdraw membership in Local 813; or threatening employees with discharge if they refuse to join Local 958.

(b) Distributing Local 958 authorization cards to employees and urging them to sign the cards.

(c) Failing to hire employees and discharging them for activities protected by Section 7 of the Act.

(d) Refusing to recognize and bargain with Local 813 as the exclusive representative of its employees in the appropriate unit with respect to wages, hours, working conditions, or other terms and conditions of employment of said employees and refusing to honor the collective-bargaining agreement applicable to those employees.

(e) Bypassing Local 813 and dealing directly with its employees.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively with Local 813 as the exclusive representative of the employees in the following appropriate unit and, on request, embody in a signed agreement any understanding reached. The appropriate unit is:

All chauffeurs and helpers, bulldozer operators, machine drivers/operators and recycling truck drivers at all locations of

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Respondents, excluding guards and supervisors as defined in the Act.

(b) Comply with the terms and conditions of the collective-bargaining agreement between APF and Local 813, including making the appropriate payments, and make whole employees for any loss of pay and other benefits that they may have suffered, with interest, in the manner set forth in the remedy section above.

(c) Within 14 days from the date of this Order offer Jeffrey McBride immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings, with interest, in the manner set forth in the remedy section above entitled.

(d) Within 14 days from the date of this Order, remove from their files any references to the unlawful discharge and within 3 days thereafter notify McBride in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since January 2, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

(h) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."